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No. 94-719

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

PATRICIA BIRKBECK, as Personal Representative of the Estate of Alan Birkbeck, Deceased; J. C. RICHARDSON,

Petitioners,

v.

MARVEL LIGHTING CORPORATION; BRUCE T. FENNESSEY,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

PETITIONERS' REPLY MEMORANDUM

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Respondents assert that the decision below does not conflict with Hicks because Hicks allows appellate review of jury verdicts. The holding by the Court of Appeals in this case clearly conflicts with the decision in St. Mary's Honor Center v. Hicks, 509 U.S. ___, 113 S.Ct. 2742 (1993), in that the court found the evidence insufficient as a matter of law to prove age discrimination even though the jury had found discrimination, by resolving several conflicts of credibility.

As Respondents tacitly concede, the jury was properly instructed on the scheme of proof applied by this Court in Hicks, which amplified the decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The jury's determination of the facts is entitled to great weight.[1] If the District Courts and the Courts of Appeals are not required to follow the implications of the scheme of proof from the cases decided from McDonnell Douglas through Hicks, the courts would have no standards for reviewing the sufficiency of the evidence when a jury returns a verdict based primarily or wholly on circumstantial evidence.

When the decision of a properly instructed jury is given the deference that is required in deciding a Rule 50 motion, after the jury finds both pretext and discrimination vel non, the burden is no longer on the employee to "convince us" (the court) of pretext -- the burden falls to the employer to show that "the evidence clearly compels rejection" of the jury's finding. App. 19.

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[1] The District Court below recognized this, App. 19:

> In deciding a motion for judgment as a matter of law, the court must view the evidence in the light most favorable to the opposing party and draw all inferences in that party's favor. The court cannot weigh the evidence or judge the credibility of the witnesses. Taylor v. Home Ins. Co., 777 F.2d 848, 854 (4th Cir. 1985). "Determination of motive is ordinarily a function within the province of the fact finder because so much depends on an assessment of the credibility of the witnesses. A finding of motive should not be set aside by the reviewing court unless the evidence clearly compels rejection." Id.

The Court of Appeals did not acknowledge this standard.

In the decision below, as in Anderson v. Bessemer City, 470 U.S. 564 (1985), this same Court of Appeals has adopted an approach where it actually substitutes its judgment of the weight and credibility of the evidence for the decision made by the finder of fact. This is not proper "appellate review" referred to in Hicks, 113 S.Ct. at 2756.

CONCLUSION

Respondents do not deny that there is a conflict in the circuits about whether Hicks requires "pretext plus"; they contend Hicks required "pretext plus" (Brief in Opposition, p. 6 n. 4), whereas the majority of Courts of Appeals have held to the contrary. (Petition for Certiorari, p. 9, n. 8.) Respondents contend that Hicks allows a court to set aside a jury verdict of employment discrimination whenever that court considers this evidence "insufficient as a matter of law" -- without regard to the standards for circumstantial evidence of discrimination established in Hicks, McDonnell Douglas, and related cases.

Petitioners do not contend that a jury verdict based on a finding of pretext could never be set aside, but such action would be rare. No verdict should be set aside where, as here, the employees presented a prima facie case and the jury then found that the employer, who testified, was lying about the reason that the employees were fired.

The Court should grant the writ of certiorari.

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